No. 89-767

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

ROBERT ALTON HARRIS,

PETITIONER,

v.

R. PULLEY, WARDEN OF SAN QUENTIN,

RESPONDENT.

PETITIONER'S REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The Respondent's Brief in Opposition to the Petition for Writ of Certiorari [hereinafter cited as RBr.], at pages 10-11, claims that the petitioner's arguments are unworthy of a hearing in this court, that they are too fact-bound, or of only scholarly interest. A fair consideration of the issues

raised by petitioner shows them to be central to the question of how far a State may be permitted go in structuring its capital punishment machinery: may it use mental disorders as "aggravating" evidence in order to argue for a death penalty; may it deny a defendant discovery of evidence it holds pertaining to race, gender and age discrimination; may it use a defendant's age as a reason to call for death; may it deny an indigent defendant's access to necessary expert medical assistance to prove brain damage when that issue was not explored previously; and may prosecutors taint the pre-trial atmosphere with prejudicial publicity and not be required to disprove the prejudice from the State-generated hostile publicity?

As framed by petitioner's petition, these constitutional issues are central not only to petitioner's case, but to thousands of other capitally-accused or convicted persons.

I. THE STATE'S USE OF A MENTAL DISORDER AS AN AGGRAVATING FACTOR WARRANTING A DEATH PENALTY VIOLATES THE FIFTH AND EIGHTH AMENDMENTS.

Respondent cites **Penry v. Lynaugh** (1989) 492 U.S.___, 109 S.Ct. 2934, as purported precedent for the proposition that the State may produce, use and argue evidence of mental disorder to urge a death penalty. (RBr. 12). The problem for respondent in such a sweeping claim is that it was Penry who first introduced evidence of his mental disorders at the guilt phase of his trial as part of an insanity defense and that the psychiatric evidence produced by the State came in at that phase to rebut his insanity defense (109 S.Ct. 2942). The case hardly stands for the proposition that where a defendant offers no mental disorder mitigation evidence at any phase of his trial, the State may nevertheless affirmatively offer expert psychiatric testimony of a defendant's alleged mental

disorder and urge that such disability is "aggravation" evidence, i.e., a legitimate reason to put a person to death. That is the issue raised by petitioner.

Penry recognizes that although there may be a downside to the defendant who presents mental disorder evidence as mitigation, nevertheless, society has long believed that "'defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse'" (**id.** at 2947, quoting **California v. Brown**, 479 U.S. 538, 545 (1987). Respondent seeks to turn **Penry** upside down by reading it as holding that persons suffering mental disorders may be held to be more deserving of death than those who have no such affliction.

Respondent concedes that petitioner's jury was free to use the prosecution evidence of his mental disorder as an aggravating

factor supportive of a death penalty (RBr., p.14-15). But respondent's claim that petitioner received some alleged benefit from this prosecution-adduced psychiatric testimony (RBr. 15) is unsupported by the record and ignores the fact that petitioner objected to the prosecutor calling Dr. Griswold, claiming such evidence was not relevant to the proceeding (RT 4638, 4642).

Nothing on RT 4757-59 (pages cited by respondent to purportedly show use of the testimony during defense counsel's argument to the jury) does anything but attempt to refute Dr. Griswold's testimony. Indeed, what petitioner's counsel argued captures the essence of this claim: "Dr. Griswold says that he is antisocial. Well, do we execute people with labels?" (RT 4757)

Respondent essentially concedes the extremely prejudicial use of the testimony -- it was "used to support other evidence that

rehabilitation is not a realistic expectation for petitioner" (RBr. 16), referring to Dr. Griswold's testimony that persons with petitioner's disorder do not learn from experience. This theme of "no rehabilitation" is repeated by respondent throughout its argument (RBr. 17, 19-20 n.7, 22).

When DSM-III was published in 1980, a year after petitioner's trial, the "inability to learn from experience" characteristic was dropped as typifying an anti-social personality disorder.[1] More recent research

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[1] This is the great danger in what the State did in this case. By using as aggravation evidence petitioner's psychological disorder, particularly one as controversial and ill-defined as sociopathy, there is the prospect that further learning will undermine the characteristics of the label. "The fledgling state of the science of psychology constrains the clinician. . . . Diagnostic classifications and defining features have, as a result, changed numerous times. Each time a change occurs, the state of accumulated scientific knowledge may be thrown back virtually to the hypothesis stage." Wyda & Black, "Psychiatric Predictions and the Death Penalty: An Unconstitutional Sword for the Prosecution but a Constitutional Shield for the Defense," 7 **Behavioral Sciences & The Law**," 505, 512 (1989). Here, the petitioner's jury never learned that the science put forth by the prosecution knows that persons such as petitioner <u>can and do change for the better</u>. They condemned him believing the opposite.

supports the proposition that persons with the disorder can improve. A recent long-term study (1964-1981) of 521 men showed that at about age 40 there is a "dramatic" drop in criminal activity by men diagnosed as sociopaths. See Hare, McPherson & Forth, "Male Psychopaths and Their Criminal Careers," 56 Jour. of Consulting & Clinical Psychology 710-714 (1988). After that age, their criminal activity drops to a level at least as low as "normal" men not suffering from the disorder but with a record of criminal activity. See also **Eddings v. Oklahoma**, 455 U.S. 104, 108 (1982), where the state psychologist testified that Eddings "suffered from such a disorder" of anti-social personality and could "grow out of it."

In other words, the central component of the States "aggravating" mental disorder used in petitioner's case to bring in a death verdict -- inability to change for the better

and thereby lose the many negative character traits of the disorder -- has been proven absolutely false! In **Johnson v. Mississippi**, 108 S.Ct. 1981, 1989 (1988), this Court reversed a death penalty where inaccurate evidence played a role in sentencing.

Respondent cites at, RBr. 17, **Barefoot v. Estelle**, 463 U.S. 880 (1983), a case involving the Texas statute which makes the defendant's likelihood of future dangerousness a factor for the sentencing jury to consider. **Barefoot**, followed **Jurek v. Texas**, 428 U.S. 262 (1976), which held that future dangerousness[2] was a legitimate statutory aggravating factor. **Barefoot** held that psychiatrists could give their opinions on that statutory issue. **Barefoot** does not hold that the State may introduce <u>mental disorder</u> evidence for the purpose of arguing that the

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[2] California has no such "future dangerousness aggravating factor" in its statute.

purported features of the disorder are so aggravating as to warrant a death penalty. That issue has not been addressed by this Court. It is the issue here.

Respondent's attempt to characterize Dr. Griswold's testimony as merely descriptive of petitioner's "pattern of behavior" and the "underlying characteristics" of such behavior (RBr. 20-21) is not borne out by the record.[3] See Petitioner's Petition for Writ of Certiorari, pp. 10-11, quoting the doctor's testimony. As Respondent states repeatedly in his brief, the key part of the testimony of Dr. Griswold was that he labeled petitioner with his "diagnosis" that he had an "antisocial personality" (RT 4650), "normally

[3] Respondent apparently argues that petitioner's position would limit the State from introducing relevant evidence of a defendant's behavior pattern. Not so. If the prosecution wishes to introduce evidence of a defendant's bad prior behavior to a sentencing jury, nothing in petitioner's position affects that right. Prior bad acts are often introduced at penalty trials, but using mental disorders as a reason to put someone to death is another thing entirely.

referred to as the sociopathic or psychopathic personality" (RT 4651). Dr. Griswold made specific reference to the primary medical reference, "DSM" (RT 4664), the **Diagnostic & Statistics Manual** of the American Psychological Association, to give his testimony a scientific aura. With the diagnostic label came the negative traits which were argued as warranting the ultimate punishment. Petitioner's jury was thus given to understand that science had determined that he suffered a mental disorder which was permanent and unchanging, and thus that he could never cast off the many negative characteristics which come with the diagnostic label. They were told there could be no rehabilitation from this status.

Respondent asserts that petitioner's position would give power to a group of psychiatrists to "stand the law on its head." RBr.20. There is no empowerment of psychology

in petitioner's position. If anything, it is the State which wishes to use the power of psychology as a tool to argue for death simply based on mental disorder evidence. It was the prosecution which alone introduced "expert" psychiatric evidence to support its case for death by urging that petitioner's mental disorder made him uniquely more qualified for death. That is constitutionally wrong.

Respondent, by **ipse dixit,** reduces the anti-social personality disorder to "just plain meanness" (RBr.22). No citation is provided for this convenient recapitulation of the psychological diagnoses. It ignores not only that this is a medically recognized mental disorder (as opposed to a choice to be mean or good), but also that it may well be biological in origin.[4]

[4] Many researchers see anti-social personality disorder as a developmental disorder brought on by environment. Yet, recent research indicates that there is a "biological substrate [which] must exist for the development of a psychopathic

Respondent does not address **Eddings v. Oklahoma** 455 U.S. 104 (1982), where this Court reversed a death sentence because the sentencing court declined to consider mitigating evidence including this very same mental disorder, or **Clisby v. State**, 456 So.2d 99, 102 (1983), where the state supreme court stated that this mental disorder must be considered as mitigating evidence, or the passage from **Zant v. Stephens**, 462 U.S. 862 (1983), where this Court stated that a statute would violate the defendant's right to due process of law if a state attached the aggravating label to factors which should militate in favor of a lesser penalty such as mental illness.

Petitioner's argument need not stretch as far as the above cases. He need not argue

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character disorder." Meloy, J. Reid, The Psychopathic Mind: Origins, Dynamics, and Treatment, p. 37 (1988 J. Aronson, Inc.).

here that constitutional error occurred because mental disorder evidence must always be deemed mitigating (RBr.22). Rather, Due Process and Eighth Amendment guarantees against cruel and unusual punishment forbid mental disorder, so labeled and raised as an aggravating factor by the State, to be urged as a reason to put a person to death.[5]

II. McCLESKEY V. KEMP 481 U.S.__, 107 S.Ct. 1756 (1987), DOES NOT PROHIBIT A PETITIONER FROM DISCOVERY IN DEVELOPING CLAIMS OF UNCONSTITUTIONAL DISCRIMINATION.

This case raises an issue left open after **McCleskey v. Kemp, supra:** may a petitioner who makes a significant statistical showing of discrimination in support of discovery motion

[5] A mental disorder is not something over which a person has control and should never be used as evidence making the death penalty more appropriate. The State's position that it may be used as a factor to impose the death penalty warrants this court's intervention to declare such a death-predicate improper. If the Court does not intervene and states are permitted to use mental disorders as a reason to urge the death penalty, what are the limits? Will all mental diseases or defects be open to such use? Or will some mental disabilities be deemed aggravating and some only mitigating? What rationale will determine the demarcation? This is an issue of gravest importance which deserves resolution by this court.

be denied identified information undeniably possessed by the State and otherwise unavailable to the indigent petitioner?[6] These materials might in themselves make a compelling showing of discrimination or at least would do so with further proof thereafter developed by petitioner.

McCleskey affirmed the lower court decision that the statistical evidence presented by Professor Baldus, which was the only evidence submitted at the evidentiary hearing, did not prove the existence of discrimination, but at most indicated "a discrepancy that appears to correlate with race." 107 S.Ct. at 1777. What **McCleskey** did not hold is that discrimination claims can never be proven in federal court either by

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[6] Thus, this is no mere appeal of the denial of a discovery motion as respondent would characterize it (RBr. 23-24). If the decision below is accurate, no amount of a proper statistical showing by a condemned inmate of a State's discriminatory practices will entitle him to hail into court specific, identified material held by the State which would materially aid the petitioner's efforts at proving his claim.

statistical analysis or by other conventional means of proving discrimination. Nor did it hold that statistical analyses alone were always insufficient to prove discrimination.

McCleskey, at 1769, holds that in order to prove discrimination in the imposition of the death penalty by statistical means alone a petitioner must come forward with evidence rising to the level of "exceptionally clear proof" that the capital decision-maker's discretion veils purposeful discrimination.

Respondent criticizes petitioner's statement that petitioner never indicated that statistical evidence was all that he intended to rely upon at a hearing in order to prove his claim (RBr. 27, n.10). He made his discovery showing based upon the statistical information available to him in order to make out more than a bare claim and to receive discovery of the State's more voluminous material. There would be no reason to make

such an assertion in a discovery motion for material held by the State. The proposition is an Alice in Wonderland upside-down approach to it: it assumes petitioner first must completely prove his case on his own, then use the complete proof as a basis for discovery from the State, all in order to be entitled to an evidentiary hearing for the showing of the fully developed claim.

Respondent also meritlessly contends that petitioner, an indigent, could have easily obtained all the information he sought by going into the fifty county clerks office in California and demanding the files on each homicide case in that county over a multi-year period (RBr. 24-25, n.9).

The assertion is as grotesque as it is fatuous. Here, California for years has accumulated at taxpayer expense a vast amount of information (which is not work product or otherwise privileged material) pertinent to

the question of discrimination and has it on accessible computer tape. In fact, the California Department of Justice has a specific internal entity, the Bureau of Criminal Statistics (BCS), charged with this precise responsibility, **inter alia**, of systematically obtaining, organizing and storing such data base information.

Just how is an indigent condemned inmate is to collect and collate the information needed for such a showing? One reasonable means is the one petitioner used -- discovery of the data maintained by the State. But "Let them eat cake" is the position of the Respondent -- that is, although the State has on computer tape a vast collection of data pertinent to the questions of the possible influence of discrimination in death penalty decisions, it chooses not to turn it over. Rather tells the indigent petitioner to go collect it himself. This hoarding of

information by the State is evidence of further discrimination in this case -- economic discrimination against the indigent who lack the resources to collect the data.

In the Ninth Circuit, as part of petitioner's reply to respondent's opposition to the petition for rehearing and suggestion for rehearing **en banc**, petitioner pointed to the declaration of a state official with responsibility for the State's data bank.[7] The declaration shows that the BCS has a system of regularized reporting from various law enforcement channels and California courts which allows BCS to input the relevant data petitioner requested in its computer pertaining to statewide offenses.

The State's position, that no discovery

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[7] Quint Hegner, Section Manager of the Special Studies Unit of the Bureau of Criminal Statistics [BCS] and Special Services of the California Department of Justice described what BCS possesses in an affidavit submitted by the State of California in litigation over the discriminatory use of the death penalty in **In re Lloyd Jackson**, Calif. Supreme Court No. 22165.

should be permitted unless the anticipated substantive discrimination claim is proved to such an extent as to demonstrate ultimate success on the merits, is not the law. The Ninth Circuit's agreement with the State should be reversed.

III. AGE OF THE DEFENDANT IS AN UNCONSTITUTIONAL BASIS FOR A DEATH SENTENCE

Respondent acknowledges that the California Supreme Court on multiple occasions has rejected the specific claim petitioner raises and which was deemed unexhausted by the Ninth Circuit (RBr. 37-38). Petitioner believes he properly raised the issue in state court and filed a brief with the Ninth Circuit documenting the claim; but even if he did not raise it precisely, exhaustion is completely futile given the recent pronouncements of the state court-continually rejecting the issue.[8]

[8] That certiorari was denied in these cases, as respondent notes at RBr. 38, ". . . imports no expression of opinion upon the merits of the case, as the bar has been told many times"

On the merits, it is Orwellian doublespeak for California to say its statute does not permit "age" to be used as an aggravating factor because it is merely "shorthand for those factors related to age" (RBr.39-40). Petitioner's jury was not given such an "limitation" on the use of age and the "shorthand" is really nothing more than a restatement that age is a permissible aggravating reason to put someone to death.

CONCLUSION

For the reasons expressed in the petition for certiorari and this brief, petitioner requests the Court grant his petition and review the significant and recurring constitutional issues raised.

12/28/89 Respectfully submitted,

Charles M. Sevilla Michael J. McCabe
Attorneys for Petitioner Robert Alton Harris

(United States v. Carver (1922) 260 U.S. 482, 490 (per Holmes, J.).

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CERTIFICATE OF SERVICE

I, the undersigned, say that I am over 18 years of age, a resident of the State of California and not a party to the within action;

That my business address is 1010 Second Ave., Suite 1601, San Diego, California 92101;

That I served the within Reply to the Respondents Opposition to the Petition for Certiorari by mailing three copies this date to:

Attorney General John Van de Kamp
ATTN: Deputy Attorney General Louis Hanoian
110 West A Street, 7th Floor
San Diego, CA 92101, and

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 29th day of December 1989 at San Diego, CA.
